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IN THE

Supreme Court of the United States

October Term, 1963.

No. 192.

UNITED STATES OF AMERICA ex rel. L. B. BINION,
Petitioner,

JAMES V. RYAN, United States Marshal for the Eastern District of Pennsylvania,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Petitioner's Reply Brief.

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OCTOBER TERM, 1963.

No. 192

UNITED STATES OF AMERICA EX REL. L. B. BINION,
Petitioner,

v.

JAMES V. RYAN, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF.

The petition for certiorari in this case requested a summary reversal and remand to the Court of Appeals for reconsideration in light of this Court's decision in *Sanders v. United States*, 373 U. S. 1 (1963).

The Third Circuit rendered its decision in this case and denied rehearing before this Court handed down the decision in *Sanders*. Obviously, therefore, the court below did not make its determination in light of the "guidelines" established by this Court for the proper disposition of a second or successive application for post-conviction relief.

This Court's opinion in *Sanders* takes particular note that the lower federal courts' decisions in this area were in disarray. The Court declared that the provision in § 2255 applicable to successive applications "has caused uncer-

tainty in the District Courts . . . and has provoked a conflict between circuits." 373 U. S. at 6-7. In an extensive opinion, this Court undertook to set out the principles that are to be followed by all federal courts, not only in dealing with applications under § 2255, but also with similar problems arising under applications for the federal writ of habeas corpus.

Since April 29, 1963, when the decision in *Sanders* was announced, this Court has summarily reversed and remanded to lower courts at least four cases for reconsideration in light of that decision. *Boies v. United States*, 83 Sup. Ct. 1294; *Baker v. United States*, 83 Sup. Ct. 1294; *Marchese v. United States*, 83 Sup. Ct. 1686; *Bone v. United States*, 83 Sup. Ct. 1879. What petitioner here requests is simply that same treatment which would have been accorded him had his petition for certiorari been pending on April 29.

The Brief for the Respondent in Opposition takes no note whatsoever of these obvious and important events. The only reference in the entire Brief in Opposition to the *Sanders* opinion is a quotation, at page 10, from an introductory passage in Part II of the opinion, where this Court sets out to formulate the "basic rules to guide the lower courts" in handling "successive applications for federal habeas corpus and motions under § 2255." 373 U. S. at 15. For completeness, the opinion of Mr. Justice Brennan states at the outset that these basic rules for handling successive applications are not applicable, of course, where the second or successive application is shown, on the basis of the application, files, and records of the case alone, conclusively to be without merit. The reason, obviously enough, is that such an application falls without regard to any prior application. The summary rejection prescribed for such an application has nothing whatsoever to do with the real problems of successive applications. Accordingly, this Court expressly noted at the outset that the basic rules it was about to set down for the disposition of second applications would not operate to a patently defective application.

Astonishingly, this is the only reference counsel for the Government made to the *Sanders* case. It is astonishing in the first place that the Government attempts to use a quotation that sounds as if it supports its position, even though the quoted matter is plainly irrelevant to the issues presented. It is all the more astonishing that the Government did not make even a pretense of defending the decision of the court below as comporting with the guidelines this Court took the trouble to announce. The Government simply chooses to ignore the painstaking effort of this Court to formulate the basic rules that should guide the federal courts in dealing with second or successive applications.

The Government's argument to this Court is, in short, an effrontery. The Government expressly points out that the Court of Appeals below rejected petitioner's claims because two of them "had previously been raised in and rejected by that court on a petition for rehearing" (Brief in Opposition, page 9). This was the prime basis given by the court below for its decision. It is the foremost proposition in the argument of the Government. To advance such an argument, after this Court's decision in *Sanders*, is to demonstrate the total bankruptcy of content in the Government's position.

As the petition for certiorari makes clear, in the earlier proceeding even such issues were raised for the first time in a petition for rehearing in the Court of Appeals. The Third Circuit had announced a decision that reversed a District Court order discharging petitioner from custody. Petitioner applied for rehearing, raising for the first time events that had occurred after the District Court's order. Petitioner's application urged these matters on the Court of Appeals only to show that reversal was a futile act. They were in no way properly a part of that appeal. The Court of Appeals, without a hearing and without opinion, denied the petition for rehearing.

The Government now has the temerity to assert that the Court of Appeals considered and rejected on the merits

the claims thus advanced. Further, the Government claims that this determination justifies forever foreclosing decision of the claims on the merits. It is not surprising that the Government studiously ignores the *Sanders* guidelines in making such an argument.

Without discussing the matter at length, since petitioner still adheres to the belief that the appropriate forum to consider this case in light of *Sanders* is the court below, a few pertinent comments may be made here. This Court held that controlling weight may be given to a denial of a prior application for federal habeas corpus *only if* "(2) the prior determination was on the merits." 373 U.S. at 15. The Government is in an impossible position if it attempts to argue that what happened in the Third Circuit when the petition for rehearing was denied meets this Court's requirement of a determination on the merits. For example, the Third Circuit might have denied the petition for rehearing simply on the ground that these new matters should be raised in a new application for habeas corpus. The Government takes no account of this likely possibility. It is more convenient for it to assert in blind disregard of the rights of an individual seeking his liberty that the claims were "rejected" by the court.

This Court's opinion in *Sanders* states explicitly that a prior adjudication is not controlling, is not a determination on the merits, if factual issues relevant to the present application are unresolved by evidentiary hearing. Petitioner has raised several factual issues in the present proceeding that are unresolved. The Government concedes now that they are unresolved, but argues in the Brief in Opposition that petitioner had ample opportunity to present evidence pertinent to these claims (Brief in Opposition, page 11). The Government studiously ignores the test laid down in *Sanders*, incorporating by reference the principles developed in *Fay v. Noia*, 372 U.S. at 438-440, and *Townsend v. Sain*, 372 U.S. at 317. If petitioner is to be denied redetermination on the merits through such an argument,

plainly it should be only after full consideration by some court in light of the appropriate standards.

Finally, this Court declared that, even if the same ground was rejected on the merits on a prior application, the matter can be reopened if the ends of justice would be served thereby. Naturally, nothing in the Government's Brief in Opposition makes reference to this guideline.

Petitioner respectfully submits that it is manifest, from even these few paragraphs, that there are serious questions in this case that require plenary consideration under the guidelines set down in *Sanders* and *Townsend*. The Government's argument amounts to nothing more than a feeble attempt to ignore, if not to negate, the basic rules developed by this Court. Petitioner urges anew that the most appropriate disposition in this case is to order the issues to be reconsidered by the court below in light of the intervening decisions of this Court.

Respectfully submitted,

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